

**Harper & Arterburn Co., Inc. and Jerry English.**  
Case 9-CA-14507

April 8, 1981

**DECISION AND ORDER**

On December 17, 1980, Administrative Law Judge Irwin Kaplan issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.<sup>2</sup>

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Harper & Arterburn Co., Inc., Paducah, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> With respect to the backpay involved, Member Jenkins would compute the interest in accordance with the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

We have modified the Administrative Law Judge's notice to conform with his recommended Order.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge any employees because they have engaged in union or related protected concerted activities; namely, enlisting the assistance of Carpenters Local 559, District Council of Four Rivers of the United Brotherhood of Carpenters and Joiners of

America, AFL-CIO, in the appointment of a steward on the job, and talking about the Union on the job in the context of terms and conditions of unemployment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL offer Jerry English immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously employed, and make him whole for any loss of earnings he may have suffered, with interest.

HARPER AND ARTERBURN, CO., INC.

**DECISION**

**STATEMENT OF THE CASE**

IRWIN KAPLAN, Administrative Law Judge: This case was heard in Paducah, Kentucky, on June 26, 1980. The underlying charges were filed on November 2, 1979, by Jerry English, an individual, and culminated in the issuance of a complaint and notice of hearing on December 19, 1979, alleging principally that Harper & Arterburn Co., Inc. (herein called Respondent), violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (herein called the Act) by discharging said Jerry English on or about September 28, 1979, because he requested that a union steward be appointed, and otherwise attempted to enforce a collective-bargaining agreement. Respondent and Carpenters Local 559, District Council of Four Rivers of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein called the Union) were parties to the aforementioned collective-bargaining agreement covering *inter alia* a unit of carpenters, including Jerry English. Respondent filed an answer and two amendments thereto conceding *inter alia*, certain facts with respect to its business operations, and the supervisory and agency status of individuals as alleged in the complaint, but it denied all allegations that it committed any unfair labor practices.<sup>1</sup> Further, Respondent asserted that English was permanently laid off because of his constant complaining which impacted on the morale and productivity of other employees.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

<sup>1</sup> Respondent in its second amended answer asserted that English is barred from relief under the Act because he failed to file a grievance with the Union. Respondent, however, elected not to proffer the collective-bargaining agreement which presumably sets forth the grievance machinery. Apparently, Respondent has abandoned this contention as its brief is silent on the subject. In any event, I hereby reject Respondent's contention as not supported by any evidence.

## FINDINGS OF FACT

## I. JURISDICTION

Respondent, a Kentucky corporation with an office and place of business in Paducah, Kentucky, has been at all times material engaged in the commercial, industrial, and highway construction business as a general contractor. During the past 12 months and at all other times material herein, Respondent in connection with the aforementioned business operations has purchased and received goods valued in excess of \$50,000 which were shipped to its Paducah, Kentucky, facility directly from points outside the State of Kentucky. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Respondent, a general contractor, was engaged in, *inter alia*, a cement pavement project covering 2.2 miles of highway in or around Paducah, Kentucky. Respondent employed carpenters, cement finishers, and laborers at the project. The carpenters employed by Respondent were members of Carpenters Local 559, District Council of Four Rivers of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein called the Union).<sup>2</sup>

On or about August 12, 1979,<sup>3</sup> James Harper, a principal owner of Respondent, hired the Charging Party, Jerry English, a carpenter and member of the Union, to work on the Paducah project. English had once previously worked for Respondent in 1978 for a period of approximately 2-1/2 months and was then laid off. When Harper hired English to work on the highway project he knew that the latter had previously worked for Respondent.

On a rainy day sometime around the second week in September, English complained to Project Superintendent James Siener about certain carpenters working in the rain while others were not and opined that this condition would not exist if there were a shop steward on the project. According to English, Siener discounted the need for a steward. English also noted the need on the project for a steward with fellow employees as well as with his immediate foreman, Frank Green.

From time to time English voiced other complaints concerning terms and conditions of employment, such as mandatory work on Saturdays and poor access to the Company's materials at the jobsite. At first the Company stored its material in a trailer about 1-1/2 miles from where English was working so that English had to use his own pickup truck to transport the materials he needed. The problem involving access to the Company's

materials was soon corrected when the Company made available a wagon to transport the materials. On or about September 22, English voiced an objection to his immediate foreman, Frank Green, with regard to cement finishers performing certain carpenter work. English testified that Green told him not to be concerned about it so long as he, English, was working.<sup>4</sup> On Monday evening, September 24, English attended a union meeting and on that occasion he informed James Seay, union business agent, about cement finishers doing some of the carpenter work. English also told Seay about some of the other problems on the job and requested that he, Seay, come out to the project and appoint a steward. Seay had only recently been elected business agent and was unaware that any project under the Union's jurisdiction was without a steward. The following morning Seay visited the Paducah highway project and designated Michael Harper (no relation to owner James Harper) as steward.<sup>5</sup> Seay then informed Superintendent Siener of Harper's appointment. Around that time, Seay also passed on to Siener English's complaint and reminded him that under agreement carpenters were to share "fifty-fifty work" with the cement finishers, and Siener in turn promised to straighten the problem out.

On Wednesday, September 26, the day after Harper was appointed steward, English learned from Harper that Respondent was planning on letting him (English) go on Friday. Later in the day English checked with Siener who confirmed that he would be laid off that Friday. Siener explained to English that all of the carpenters had stated that they could not work with him, and he, Siener, would not let English work by himself.<sup>6</sup> English elected not to finish out the week.<sup>7</sup> The next morning, however, English returned to the project with Business Agent Seay to persuade Siener to reconsider. This, Siener refused to do and explained to Seay, as he had to English the previous day, that none of the carpenters could work with English and he refused to let him work by himself. According to English and Seay, they immediately checked with other carpenters and all of them denied telling Respondent that they could not get along with English.<sup>8</sup>

<sup>4</sup> The record discloses that foremen are covered by certain terms of the collective-bargaining agreement. On the other hand, foremen are selected by employers, receive higher pay than unit employees, assign work, and are in charge in the absence of the superintendent. However as Green is not alleged to be either a statutory supervisor or an agent of Respondent, I make no finding as to his representative status. In any event Superintendent Siener admitted that Green told him that English complained about cement finishers performing certain carpenter work and that English expressed a need for a steward.

<sup>5</sup> English encouraged Seay to appoint Harper as steward on the basis of seniority on the project. Harper did not appear pleased with the appointment. Thus, he testified that no other carpenter wanted to serve as steward and noted that stewards, unlike foremen, do not receive extra compensation. Harper was later promoted to foreman on another project.

<sup>6</sup> During the week of September 24 and for a number of weeks prior thereto, Respondent employed approximately 10 carpenters on the highway project and these employees generally worked in teams of two.

<sup>7</sup> Respondent in its brief concedes that English was constructively discharged on September 26.

<sup>8</sup> All the carpenters, however, were not interviewed because as testified by Seay four of them "were way up the road." Michael Harper, Nelson Timmons, and Higdon were the only other carpenters to testify.

*Continued*

<sup>2</sup> The parties stipulated and I find that at all times material herein Respondent and the Union maintained a collective-bargaining relationship covering carpenters.

<sup>3</sup> All dates hereinafter refer to 1979, unless otherwise indicated.

### B. Discussion and Conclusions

The General Counsel contends that Respondent discharged English "because he talked about the Union on the job and requested that a union steward be appointed for the carpenters on the project," and that Respondent thereby violated Section 8(a)(3) and (1) of the Act. Respondent, on the other hand, contends that English was terminated because of substantial and legitimate business considerations, "namely [English's] complaining which disrupted the work of other employees."

It is undisputed that English spoke to fellow employees and to management about the Union and expressed the need for a steward on the project. It is also undisputed that English called for the appointment of a steward, *inter alia*, because he contended that cement finishers were performing certain "Carpenter" work. In this regard English credibly testified that, on or about September 22, he complained to his foreman, Green, about cement finishers doing carpenters' work and the latter assertedly told him not to care "as long as [he, English] was working." While I have not found Green to be Respondent's agent or a statutory supervisor (fn. 3, *supra*), it is noted that Siener, admittedly a supervisor and agent within the meaning of the Act, testified that Green transmitted English's complaints to him the week of September 24, as well as English's desire to have a steward on the project. In any event English credibly testified that Siener told him that a steward was not needed on the job.<sup>9</sup> English believed otherwise and at a union meeting conducted Monday night, September 24, he requested the assistance of Union Business Agent Seay. English told Seay about the problems on the project, including the matter of cement finishers doing unit work, and requested Seay to visit the project and appoint a steward which Seay agreed to do. The next day, September 25, Seay appeared at the project and designated Harper as steward and then notified Superintendent Steiner of Harper's appointment. About that time Seay also followed up on English's complaint about cement finishers doing carpenter work and received assurances from Siener that Respondent would comply with the union agreement for carpenters to share the disputed work with cement finishers "fifty-fifty." English was terminated the day following Seay's appearance at the project and appointment of Harper as steward.

According to Respondent, English's layoff occurring so close in time to the appointment of the steward was "purely coincidental" and unrelated "to union or other statutory protected activity." In support thereof Respondent argues that the record is devoid of any evidence tending to establish hostility toward the appointment of a steward. Affirmatively Respondent contends, as noted above, that it permanently laid off English be-

However for reasons discussed more fully *infra*, the testimony of these witnesses fall far short of establishing widespread discontentment with English among his fellow carpenters or that any of the carpenters refused to work with him on a team basis.

<sup>9</sup> On the basis of demeanor, responsiveness, consistency, plausibility, and the fact that English's testimony in significant part was corroborated by Respondent's witnesses, I find that English's testimony is credible in all material respects.

cause of "constant complaining which disrupted the work of other employees."

The General Counsel contends, the record supports, and I find that Respondent's stated reason for the termination is pretextual. According to Siener, employees came to him "all the time" complaining about English's griping and some of them asked that they not be assigned to work with him. Siener admitted that the first time that he conveyed to English that other employees complained about him was on September 26 when he was told that he would be laid off. It appears highly unlikely that if English were such a disruptive force that his conduct impacted on production, Respondent would not have stopped it sooner, or at least brought it to his attention. It is also noted that Respondent hired English to work on the instant project, knowing that he had previous service with the Company, a further factor tending to militate against a finding English was a disruptive employee. Insofar as Respondent's assertion that other employees could not work with English, I find that it is not supported by the record. The only testimony Respondent adduced from its complement of carpenters was that of Michael Harper and James Higdon and even they hardly substantiate Respondent's contention. According to Siener about 1 or 2 weeks before he terminated English, Harper complained, stating "that he would prefer not to work with [English]." This however is disputed by Harper. Harper denied that he ever told Siener that he did not want to work with English or even that he "preferred" not to work with him.<sup>10</sup> Harper testified that the only time he complained about English was on September 25, after he was appointed steward to which Siener "sort of laughed."<sup>11</sup> Higdon testified that English was too concerned with union rules and that he and English as a team "did not get much production."<sup>12</sup> However, Higdon testified that he does not think that he ever complained to Siener about English, never asked Green to reassign him, and never refused to work with English. While there came a time in mid-September when Higdon was assigned to work with Green, he insisted that the new assignment had nothing to do with any complaint about English but rather was dictated by the experience he and Green possessed to do a particular job. In these

<sup>10</sup> In crediting Harper over Siener it is noted, *inter alia*, that Harper was Respondent's witness and still in the employ of Respondent. As such, Harper testified against self-interest, a matter not to be lightly disregarded. See, e.g., *Federal Stainless Sink Div. of Unarco Industries, Inc.*, 197 NLRB 489, 491 (1972); *Gateway Transportation, Inc.*, 193 NLRB 47, 48 (1971); *Georgia Rug Mill*, 131 NLRB 1304, 1305, fn. 2 (1961). On the other hand, I found Siener unimpressive in demeanor and his testimony to be inconsistent, equivocal, unresponsive, and unreliable.

<sup>11</sup> English encouraged Harper to accept the appointment as steward, a position which Harper did not appear to want. See fn. 4, *supra*.

<sup>12</sup> Higdon's testimony was largely vague and conclusionary. Thus when asked whether he could describe or measure production Higdon stated, "Not any way that I think I could describe that anyone could understand it. I would say no." According to Higdon, unlike the view expressed by English there was no need on the job for a steward. Thus Higdon's position was the same as that expressed by Siener to English. It is also noted that Higdon was still employed by Respondent at the time he testified, a factor not without relevance in considering overall credibility. With due consideration to the foregoing, my observation of Higdon's demeanor, and his testimony taken in its entirety, I found him to be less than forthright, particularly when describing differences between himself and English in meeting production requirements on the job.

circumstances, I find that the evidence falls far short of establishing that employees could not function with English on the job or that he was otherwise a disruptive force as contended by Respondent.

In addition to the foregoing, there were other positions taken by Siener relative to English's termination which were not supported by the record. Siener denied that he ever fired English but rather asserted that the latter quit when informed that he would be laid off. However, as previously noted Respondent conceded that English was constructively discharged (fn. 7, *supra*). According to Siener, on the day English last worked, he, Siener, had also decided to lay English off as part of a general reduction in force. Thus when pressed by Seay whether he had any other reason for terminating English, he (Siener) assertedly responded, "No, but it could be a job cut back." However, Siener's assertion in this regard is not supported by probative evidence. Thus, the record does not reveal the identity of other carpenters laid off over the next several weeks as a result of any cutback. On the other hand, the record reveals that carpenters worked overtime during the week of September 24 and the following week. As Siener conceded that he would not have permitted English to remain in the employ of Respondent even in the absence of any cutback and noting otherwise that he was an unreliable witness, I find that this added or shifting reason smacks of pretext, and it is hereby rejected.

In short, I find Respondent's assigned reason as set forth above for terminating English was pretextual.

Respondent asserted that there was no evidence tending to show that it harbored hostility to the appointment of a steward and "[t]herefore there is no evidence to support an inference that the layoff was motivated by retaliation for English's seeking to have one appointed." In arguing against my finding herein of antiunion animus, Respondent also represented that it enjoyed an "unblemished record of good relations with the Carpenter's union."

In determining whether Respondent manifested animus *vis-a-vis* the appointment of a steward I have considered, *inter alia*, that Respondent's assigned reason for terminating English was found herein to be a pretext. As the Board has observed, "a pretext reason, of course, supports an inference of an unlawful one." *Keller Manufacturing Company, Inc.*, 237 NLRB 712, 717 (1978). However there are also other significant factors in the record supporting a finding that Respondent found the absence of a steward to its liking. Thus, without a steward on the project to protect unit work and/or compliance with the terms of the union contract, Respondent had greater freedom to assign work either to cement finishers or to carpenters. This condition Siener appreciated and hoped to maintain as evidenced by his telling English that a steward was not needed on the project.

The essence of English's complaints were corrected only when he enlisted the assistance of the union business agent. While Respondent may have had "good relations" with the Union, I find Siener's attitude regarding a steward's presence on the project more telling *vis-a-vis* improper motive in the circumstances of this case. The fact that Siener later voiced no formal objection to the

appointment of a steward or that he agreed to share the work previously assigned to cement finishers equally with carpenters tends to establish the validity of English's positions. Cf. *Continental Oil Company*, 161 NLRB 1059, 1062 (1966), where *inter alia* the employer was not aware of the activities. It has long been held that such complaints about working conditions and efforts to enlist union assistance in connection therewith are protected by the Act. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enfd.* 388 F.2d 495 (2d Cir. 1967). See also *G & M Underground Contracting Co.*, 239 NLRB 78, 80 (1978).

Noting that English was aggressively engaged in union and other related protected concerted activities, which were well known to Respondent, and further noting the temporal proximity of English's termination relative to Business Agent Seay's initial appearance at the project and contemporaneous appointment of a steward, and having found that Respondent's stated reason for terminating English was pretextual, I further find that the General Counsel has established by a preponderance of the credible evidence that Respondent terminated English in violation of Section 8(a)(3) and (1) as alleged.

### III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with its operations described above in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Jerry English because he engaged in union and other related protected concerted activities, namely, enlisting the Union's assistance in the appointment of a steward on the job and talking about the Union on the job in the context of terms and conditions of employment, Respondent has violated Section 8(a)(3) and (1) of the Act.

### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent discharged Jerry English in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent be ordered to offer full and immediate reinstatement to his former or substantially equivalent position and make him whole for any loss of earnings he may have suffered by reason of his unlawful discharge, by payment to him of a sum of money equal to that which he normally could have

earned from the date of discharge<sup>13</sup> to the date of a valid offer of reinstatement.<sup>14</sup> Backpay shall be computed according to *F. W. Woolworth Company*, 90 NLRB 289 (1950). Payroll and other records in the possession of Respondent are to be made available to the Board, or its agents, to assist in such computation. Interest on backpay shall be computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>15</sup>

While the unfair labor practices found herein are not inconsequential, I do not on balance find that they reached the level of justifying a broad cease-and-desist order. It is noted, *inter alia*, that the record is devoid of any evidence tending to show that Respondent has violated the Act other than the findings herein. Accordingly, I shall recommend the narrow cease-and-desist language in the order. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>16</sup>

The Respondent, Harper & Arterburn Co., Inc., Paducah, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging any employees because they have engaged in union or other related protected concerted activities, namely, enlisting the assistance of Carpenters Local 559, District Council of Four Rivers of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, in the appointment of a steward on the job,

<sup>13</sup> As the record discloses that English would not have been terminated until September 28, backpay should commence to run as of that date.

<sup>14</sup> The record discloses that Respondent transfers employees to its several projects in the Paducah, Kentucky, area, as needed.

<sup>15</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>16</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

and talking about the Union on the job in the context of terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Jerry English immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, upon request, for examination and copying, all payroll records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Paducah, Kentucky, copies of the attached notice marked "Appendix."<sup>17</sup> Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>17</sup> In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."